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No. 71-1159

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In the Supreme Court of the United States

OCTOBER TERM, 1971

ANDREW J. LOCOCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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Assistant Attorney General,

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OPINIONS BELOW

The initial opinion of the court of appeals ordering a limited remand is reported at 450 F.2d 1196 (Pet. App. A). The opinion of the district court on remand and the subsequent order of the court of appeals affirming the conviction (Pet. App. B and C) are not yet reported.

JURISDICTION

The court of appeals remanded this case to the district court on September 27, 1971, to allow it to

make findings and conclusions on an issue not raised in this Court. The judgment of the court of appeals after remand was entered on December 28, 1971. A motion for rehearing was denied on February 9, 1972 (Pet. App. D). The petition for a writ of certiorari was filed on March 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's perjurious testimony was material to the grand jury's investigation of interstate gambling activities.

2. Whether the cross-examination of petitioner's character witnesses was prejudicial.

STATEMENT

After trial before the district judge in the United States District Court for the Central District of California, petitioner was convicted of one count of perjury in violation of 18 U.S.C. 1621. He was sentenced to five years' imprisonment, with the sentence to be suspended after six months, and was fined $2,000.

The evidence showed that in December 1968, a federal grand jury was convened in Los Angeles to investigate, *inter alia*, interstate gambling and bookmaking activities in violation of 18 U.S.C. 1952 (R. 6, 11-12, 80).[1] During the course of that investi-

[1] "R." refers to the trial transcript; "GX" refers to Government Exhibit.

gation, the grand jury heard testimony from two witnesses that petitioner accepted bets too large for other bookmakers (lay-offs) and that he took bets on any sports event and placed bets himself (GX 103, 104; R. 11-12, 17). Among other matters brought to the grand jury's attention prior to petitioner's appearance were the gambling activities of two Milwaukee residents, Ray Mirr and Frank Sansone (R. 9, 16). The grand jury was also aware of 100 telephone calls to Sansone and 85 to Mirr from petitioner's restaurant (The Cockatoo) in the previous six months, during which time three of the races under investigation were run. On September 25, 1968, the day following one of these races, three calls from petitioner's restaurant were made to both Sansone and Mirr (GX 4, 5; R. 45-46).

The grand jury, believing that petitioner might have had information regarding the matters under investigation, subpoenaed him to appear on June 26, 1969 (R. 12). Petitioner appeared and, at the commencement of the proceedings, an Assistant United States Attorney advised him that the grand jury was looking "into possible violations of the Federal laws relating to interstate wagering activity, interstate transportation and aid of racketeering, bribery and sporting contests, and possible other Federal offenses" (R. 80). Preliminary questions dealt with general background information on petitioner's business activities. The grand jury then advised him of its specific concern with a series of fixed horse races that were run in California during the past year

(R. 82). After he had answered questions regarding that matter (R. 82-86), the grand jury broadened the inquiry and asked petitioner about his possible activities in bookmaking and wagering. He admitted having known or heard of certain named individuals, including Ray Mirr, a resident of his home town of Milwaukee, Wisconsin; petitioner stated that he had known Mirr for 27 years (R. 88-89). In response to a further question, petitioner testified that he had not spoken to Mirr on the telephone in the past year (R. 91). This statement, later proven to be false, was the basis of the perjury charge.

At trial, petitioner called several character witnesses to testify to his reputation in the community. On cross-examination, the following questions were asked of each witness (R. 548, 589, 593, 600, 605-606, 611-612):

> Q. [H]ave you ever heard that Mr. Lococo was engaged in bookmaking activity?
>
> Q. Have you ever heard that he was known to place substantial wagers through bookmakers?
>
> Q. Have you ever heard that Mr. Lococo caused the burning of his restaurant in 1958 in order to collect the insurance?
>
> Q. Have you heard that Mr. Lococo was a close associate of a number of racketeers in Milwaukee, Wisconsin?
>
> Q. Do you know anything about any of Mr. Lococo's Milwaukee associates?

ARGUMENT

1. Petitioner contends that his perjurious statement was not material to the grand jury's investigation. When petitioner appeared before the grand jury it had the following information: two witnesses had testified that petitioner had taken bets; two Milwaukee residents, Mirr and Sansone, had gambling backgrounds; telephone records showed numerous calls from petitioner's restaurant to Mirr and Sansone during the period under investigation, with some of these calls placed very near the time of certain races that the grand jury was investigating. The questions the grand jury asked petitioner were aimed at discovering whether the telephone calls to Mirr were related to gambling activities. Since the grand jury was investigating any interstate activities in furtherance of gambling (not just horse racing), these questions were relevant. If petitioner had telephoned Mirr during the past year, this may have supplied a link bearing on the interstate gambling activities being probed.

2. Petitioner also claims that he was prejudiced by the government's cross-examination of his character witnesses. However, petitioner raised no objections to any of these questions at trial, which took place before the district judge without a jury. See *United States* v. *Lookretis*, 422 F.2d 647, 651 (C.A. 7), certiorari denied, 398 U.S. 904; *United States* v. *Gulley*, 404 F.2d 534, 536 (C.A. 7); *United States* v. *Lewis*, 433 F.2d 1146, 1152 (C.A. D.C.). In any event, since petitioner put his reputation in issue

by eliciting testimony from these witnesses regarding his character, the prosecution permissibly engaged in cross-examination on this issue. *Michelson* v. *United States*, 335 U.S. 469. The questions complained of were within the bounds of allowable inquiry. While the last question, which began "Do you know," may not have strictly adhered to proper form, it was not so prejudicial, in a trial to the court, that it constituted plain error.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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